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JAMES D. MAHE

Supreme Court

Case No. 107

In the Supreme Court of the United States

PORT OF SEATTLE,
Appellant,

vs.

OREGON & WASHINGTON RAILROAD COMPANY AND J. F. DUTHIE & COMPANY,
Respondents.

Case No. 107

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT

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MOTION TO REMAND.

The first point made by respondents upon the point involving the Motion to Remand is that the question is one involving the merits of the case rather than jurisdiction, counsel for respondents citing cases of *Illinois Central Ry. Co. vs. Adams*, 180 U. S. 410 and *Scully vs. Bird*, 209 U. S. 481.

Neither of these cases were brought in the State Court, nor was the question of the right of removal involved. The case at bar was brought in the State Court and it was necessary for the respondents in seeking the removal of the case to make it affirmatively appear that there was diversity of citizenship and in the absence of its being made so affirmatively to appear, respondents were not entitled to the removal, and the removal having been granted, the case upon motion should have been remanded.

The bill showed upon its face (as appears from the discussion in appellant's original brief and in the discussion hereinafter in this brief) that the case was brought by the appellant as *representative of the State of Washington*. It therefore appeared upon the face of the record in the State Court at the time the petition was presented and heard

that it was a suit brought by a representative of the State to assert the State's rights. No case will be found which supports the right of removal in such a case.

The case of *Illinois Central Ry. Co. vs. Adams*, 180 U. S. 410 above referred to was a case brought against state officers to enjoin the enforcement of a tax claimed to be unlawful, and it being contended by the defendant that the suit was against the State the court held the contrary, saying, "but where the suit is against an individual by name and he desires to plead an exemption by reason of his representative character he does not raise the question of jurisdiction in its proper sense."

The case of *Scully vs. Bird*, 209 U. S. 481, above referred to, was an action to enjoin unlawful and malicious prosecution by a dairy and food commissioner, the action being alleged to be done under cover of office but in violation of State laws, and the court in that case, which was brought in the Federal Court, held that the defendant if he desired to take advantage of the defense that he was acting in a representative character, must do it by pleading and that the question of jurisdiction was not technically involved.

The only case cited by respondents in which the suit was brought in a State Court was the case of *M. K. & T. R. Co. vs. Hickman,* 183 U. S. 53, which was cited in appellant's original brief and discussed at length on pages 46 and 47. It was held in that case that the State was not the real party, upon the ground that the State had no interest in the determination of the suit, the suit being brought by a Railroad Commission against a Railroad Company with respect to the subject of rates, in which only the railroad on the one side and the general public on the other were interested, the State having in fact itself no interest. But the court in that case did approve the rule laid in *Ferguson vs. Ross,* 38 Fed. Rep. 161, 3 L. R. A. 322, cited in appellant's brief, being another case brought by a state officer in the name of the officer, in which the moneys to be recovered were payable into the State Treasury. It was held in that case that the State was the real party and that it therefore could not be removed from the State to the Federal Court.

The case at bar is also to be distinguished from all the cases cited by respondents in that it is not a case in which the respondent has brought the action as against appellant and is claiming threatened un-

lawful action by appellant either under cover of alleged State authority or otherwise. There was no such threatened action. The suit was brought by appellant as the State's representative to have the rights of the State determined by the State Court. It has been repeatedly held by this court that where the action threatened is to take orderly procedure through the medium of the court, the action cannot be enjoined as against a representative of the State, even though it be claimed that the law under which the action is brought is alleged to be unconstitutional and void. See

Fitts vs. McGhee, 172 U. S. 516; 19 Sup. Ct. Rep. 269;

In Re Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164.

"A proceeding against officers of a State merely to test the constitutionality of a state statute in the enforcement of which the officers will act only by formal judicial proceedings in the courts of the state, as attorneys for the State, is in effect a suit against the State."

Western Union Telegraph Co. vs. Andrews, 154 Fed. Rep. 95, 107.

This case contains an exhaustive review of the authorities.

Counsel for respondents also refer to the judgment of the lower court, saying that it "imposes no liability upon the State, requires no affirmative action by its officers, deprives it of no property it now possesses and takes from it no revenue it ever enjoyed."

Of course the judgment entered has no bearing upon the question of the right of removal. The right of removal depended entirely upon the record in the State Court as shown by the petition for removal and the bill of complaint. If these did not show a right of removal, appellant is entitled to have the case remanded. However, we cannot agree with counsel as to the effect of the judgment. The Port is authorized under State law to lease the waterway area involved on behalf of the State for rental to be paid into the State Treasury, and if the decree of the lower court stands, the State will be deprived of its rental and the appellant as its representative cannot perform the function vested in it by the State for the State's interest, the lower court having in effect decreed that the title of the State is subject to an easement in favor of respondent.

The second point made by respondent in discussion of the Motion to Remand is that the appellant having been given the power to sue and be sued in its own corporate name, thereby the State consented to be sued through its representative.

Appellant is a municipal corporation having the power to own and actually owning docks, warehouses and terminal facilities and conducting a warehousing and terminal business. We do not of course contend that if the Port sues to collect wharfage or any other charge which it is authorized to collect for its own benefit as a municipality, or if it brings any suit with relation to its property which it holds as a municipal corporation for its own benefit or that if any suit is brought against it on any contract or liability incurred by it, or with respect to any of the property which it holds as a corporate entity, that in such suit the Port represents the State or that such a suit could not under proper diversity of citizenship in the opposite party be removed to the Federal Court.

But we do claim that where, as in this case, the State law in providing for the giving of permits on behalf of the State for the use of the State waterway areas authorizes the State Land Commissioner to

make leases where the waterway is outside of the Port District and vests the same function in the Port as the State's representative where the waterway is in the Port District and requires that in both cases the rent shall be paid to the State, that the Port is just as much a representative of the State as the State Land Commissioner would be and that if a suit is brought by either expressly upon the face of the bill as a representative of the State and for the purpose of quieting the State's title as against the adverse claim of anyone disputing the power of the State to control such waterway area, that the suit is in effect one by the State and not by the official or State agency appearing as the nominal party plaintiff.

The cases cited by respondent in support of its contention on this point are not in our opinion adverse to our position. The case of *Interstate Construction Company vs. Regents*, 199 Fed. Rep. 509, was a suit brought against the Regents of the University of Idaho on a contract made by the Regents for the construction of buildings by the plaintiff as contractor. The Regents of the University was a municipal corporation and as such made the contract for the construction of the buildings for their

corporate purpose. The case of *Hopkins vs. Clemson Agricultural College,* 221 U. S. 636, was one in which the court held that the Clemson Agricultural College of Southern California could not avail itself of the State's constitutional immunity from suit where the corporation was sued for its construction, under State authority but for its own corporate purposes and advantage, of a dike upon land owned by the State but in the use, possession and enjoyment of the college, it being contended in the suit that the construction damaged the property, without due process of law, the court holding that the dike was for the college's own proprietary and corporate purposes.

The other case cited in support of this point is that of *Reagan vs. Farmers Loan & Trust Company,* 154 U. S. 362-391. That is a case brought to enjoin the enforcement of alleged invalid regulations made by a Public Service Commission and is, of course, easily distinguished upon two grounds, first, that it is a suit brought against rather than in favor of a State representative and to enjoin invalid threatened action rather than to establish the State's rights by decree of court in advance of action, and in the second place that it involved questions which

were only of interest to the public on one side and the plaintiff on the other, the State having itself no interest.

The third point made by respondent upon the motion to remand is that appellant in this case is in reality asserting its own claim of ownership and right to use exclusively the waterway area for its own corporate purposes and for the revenue it may derive therefrom and that the State has at most only a remote, indirect and contingent interest in the results of suit.

Counsel for respondent seek to justify this position by an argument based upon the terms of the bill of complaint in this case and the Washington statutes relating to the waterway area and the Port of Seattle. We think a careful consideration of both the bill and the law supports appellant's rather than respondents' position.

Referring first to the complaint (Record, pp. 1 to 3) it alleges that plaintiff is a municipal corporation (Par. 1), that the defendants, Oregon-Washington Railroad Company and J. F. Duthie & Co. are each corporations (Par. 2) and that the respondent O. & W. R. Co. had delivered a certain lease annexed to complaint, marked "Exhibit A" to

the respondent J. F. Duthie & Co. (Par. 3); the ownership by respondent O. & W. R. Co. of certain upland abutting on the East Waterway, the establishment of a Pierhead Line, that the "waterway area between the said shore line and the said Pier Head Line as the same abutts upon the premises herein described is within the jurisdiction of the plaintiff *acting for and on behalf of the State of Washington;*" that in the lease marked "Exhibit A" the respondent O. & W. R. Co. purports to claim and does claim jurisdiction over said waterway area; that it had no right or interest therein and had made no application to appellant for a permit for the use of it and none had been granted to it and that its claim was wholly unfounded (Par. 4); That appellant had granted a waterway area permit to respondent J. F. Duthie & Company of which copy is annexed, marked "Exhibit B" (Par. 5); that in the lease marked "Exhibit A" the rental reserved to respondent O. & W. R. Co. from respondent Duthie & Company included rental for the waterway area (Par. 6).

By reference to "Exhibit B" it will appear that the Port gave the permit to respondent Duthie & Co. expressly under the terms of Chapter 168, the

title of the Act being therein quoted (Record p. 9).

The complaint concluded with a prayer asking for an injunction against the respondent O. & W. R. Co. from claiming or exercising any jurisdiction over the waterway area and seeking a reformation of the lease between the two respondents by striking therefrom the provisions therein by which the respondent O. & W. R. Co. claims jurisdiction over the waterway area and attempts to grant any rights therein to the respondent Duthie & Company and directing the remission of any rent collected on account of the waterway area, and enjoining any further collection of such rent for the waterway area and praying that the *title of the plaintiff for and on behalf of the State of Washington* in and to said waterway area be quieted as against the respondents except the right of the respondent Duthie & Company under "Exhibit B," and that it be decreed that the respondent Railroad Company has no right, title or interest in the waterway area or any part thereof, and for general equitable relief.

This case was not brought by counsel now representing appellant. Counsel then representing appellant in bringing the suit conceived it to be proper not only to obtain a decree quieting the title of the

State to the waterway area as against the adverse claim of respondent Railroad Company, but also that the court might reform the lease set forth in "Exhibit A" between the respondents. The trial court (rightly we have no doubt) held the latter portion of the relief desired would be improper and upon motion struck out paragraph VI, upon which that portion of the prayer was based.

Paragraph VI, however, and the portion of the prayer based thereon is of interest as bearing upon the claims made by appellant in the bill upon the basis of which this court must act in deciding the question raised by appellant's motion to remand.

Whatever rights the appellant in fact had in the suit were clearly based under the bill upon the claim, on behalf of appellant, that it had the sole right on behalf of the State of Washington to lease the waterway area and that all claims of the respondent Railroad Company adverse to such right were invalid and clouded the title, and interfered with the full assertion of the title of the State to the waterway area.

The Court in considering the motion to remand is not concerned with the question as to whether or not the Port had a right to maintain the suit on behalf of the State. The fact remains that it did

in fact bring the suit claiming to represent the State and did assert the State's rights. If this suit was unfounded, that might be a reason for dismissing the bill when the matter was heard in the State Court. But the suit, whether properly or improperly brought by appellant as representative of the State, and claiming to represent its rights and power, was in fact so brought and it is not framed or based at all upon the Port's individual interest of any kind in the waterway area or its ultimate beneficial interest in the rental reserved to the State and which under the Statute ultimately would be partially paid by the State into the Port's Treasury.

Counsel for respondents claim that the title of the State was not involved as the respondent Railroad Company conceded that the State is possessed of the title to the waterway. It is true that it is conceded that the State has the fee, but counsel contends that the respondent has a right to use the waterway area for purposes of access to navigable water, and has the right to wharf out to the Pierhead Line. The title of the State therefore that is conceded is only a qualified title and subject to the alleged paramount easement of respondent. We take it to be elementary that an action to quiet title may be brought to quiet

title against the encumbrance of an easement or servitude, and that is exactly what is sought in this case.

It is worthy of note that counsel for respondents did not upon the trial below contend that appellant had no right to bring this suit as the State's representative, respondent being, apparently, quite willing that the court should entertain the bill as brought and determine the rights between the State and respondent. The question is now raised for the first time in opposition to appellant's contention that the suit should have been and should be remanded to the State Court, it having in fact been brought by the appellant in express terms solely as a representative of the State and to vindicate State rights and to sustain the validity of Chapter 168 of the Laws of 1913, authorizing it to deal with the waterway as the State's representative and on behalf of the State and for rentals to be paid to the State.

THE PIERHEAD LINE.

Quite a controversy has arisen in the briefs on the subject of the pierhead line. We will review the record to make it clear. Before doing so, however, something by way of explanation and reply to the claims of opposing counsel not based on the record.

When we stated in our original brief that "we do not believe, notwithstanding the allegations of the answer, that counsel for respondents will contend that the plat of East Waterway filed by the Harbor Line Commissioners * * * contains any pierhead line" we did so in good faith, knowing the fact to be to the contrary, and supposing that counsel was equally well advised. When we made the statement we had in our possession a letter from the State Land Commissioner stating the fact as we stated it and since receiving respondents' brief we have made a trip to the State capital and personally examined the plat of the East Waterway, made by the Harbor Line Commission, and there is no pierhead line on it. However, no doubt this court must try this case upon the record as made rather than upon the conflicting claims of counsel as to matters not in the record. We will therefore now discuss the record.

The Allegation of the Complaint

Counsel base their claim that the pierhead line is on the Plat of East Waterway made by the Harbor Line Commission principally upon the allegations of the complaint and claim that we are thereby estopped to dispute the fact.

The allegation of the complaint referred to is "that the State of Washington and the United States Government have established in said East Waterway a distance of 125 feet from the shore line of the premises herein described, a pierhead line" (Record p. 2).

This 125 *foot pierhead line is shown by the record to have been established June* 18, 1914 (Record p. 42).

Respondent Railroad Company's predecessors in title got their deeds from the State in the years 1900, 1902, 1904 and 1905, their title actually going back to 1899 when preference applications were made for the purchase of the land (Record pp. 60, 61). And respondent Railroad Co. got its own deed from its predecessors in title in the year 1910. (See Paragraph III of Respondents' answer, Record pp. 25, 26).

The pierhead line referred to in the complaint therefore clearly appears to have been established not only long after the purchase by respondents' predecessors in title, but long after the acquisition of title by respondent and a year after the passage of the Act of 1913, which respondents now claim to be unconstitutional because it seeks to destroy rights claimed under respondents' deeds and which respondents now in the brief seek to have construed with

reference to a pierhead line established after both the deeds and the passage of the law which they attack.

The allegation in the complaint is, of course, inaccurate. The only reference to a pierhead line in any Statute of the State of Washington is in this very law of 1913, Chapter 168, where it is referred to as a "pierhead line established by the United States Government" (See appellant's brief, p. 10).

And the fact that there is nothing in our Statutes providing for the establishment of a pierhead line by the State is recognized by the decisions of our own courts (See appellant's brief p. 67).

The purpose, of course, of the allegation in the complaint was to show the right of the Port as the State's representative to bring the action, there being no provision of law except in the 1913 Act providing for the giving of permits to erect structures in the waterway area and that being conditioned upon the United States Government having established a pierhead line. The statement that the State and the United States Government had established it is, of course, an inaccurate statement, though it does appear that the 125 foot line referred to was approved by the Port Commission as they joined in the petition

to the Government to move the old Government pierhead line back to the 125-foot line.

However, if the words are taken in their broadest and fullest sense, the allegation goes no further than the establishment by the State of the 125-foot pierhead line at some time prior to the filing of the complaint, the date being clearly shown, by the testimony above referred to, to be in 1914 when it was in fact actually established at the request of the Port Commission by the United States Government. It being established long after both the deeds and the passage of Chapter 168 of Laws of 1913, it is wholly immaterial for the purposes of this case who established it. So much for the allegation of the complaint.

The 250 Foot Pierhead Line

The 250-foot pierhead line appears on Exhibits 1 and 3. Exhibit 1 is shown by the certificate endorsed thereon to be a "Copy of those portions of Plates 32, 33, 36, 37, 41, 44, 45, 46, 47 and 48, Seattle Tide Lands, lying adjacent to the East Waterway, said plates being found in Volume 2, Seattle Tide Lands, filed in the office of the Board of State Land Commissioners March 15th, 1895."

Where did this plat come from? By reference to

the Tide Land Act (see Appellant's Brief, pp. 20 to 23) it will be seen that provision is made for the appointment in each county of a Board of Appraisers to plat the Tide Lands in their County (Sections 3 and 6). The plat was to be filed with the County Auditor of the County and one copy delivered to the State Board of Equalization (Section 7), the said Board of Equalization being also created "a Board of Equalization and Appeal" (Section 2). By an Act passed in 1893 the Legislature of Washington made the Board of State Land Commissioners the successor of the State Board of Equalization and Appeal in all matters, and provided for the transfer to the Board of State Land Commissioners of all their records, plats and other papers (See Washington Laws of 1893, pp. 386,387, 388). As the duty of platting the Tide Lands for State purposes was committed to the Board of King County Appraisers; as this board did plat the land (See Exhibit 3 hereinafter referred to) and as they were required to file their plat with the Board of Equalization and Appeal, which went out of existence in 1893, and as the Board of State Land Commissioners was made the successor to their powers and the plat prepared by the King County Appraisers is shown on its face to

have been prepared in 1894 and 1895, it is clear where the plat shown in Exhibit 1 came from. It is the plat of Seattle Tidelands made by the King County Appraisers filed in the office of the State Land Commissioner. The Harbor Line Commission had nothing to do with it. The King County Appraisers had no function in connection with any waterway.

The other plat in the record, showing a 250-foot pierhead line, is Exhibit 3, which is the index sheet of the plat of Seattle Tide Lands "as certified and filed by the Board of Appraisers of Tide and Shore Lands for King County, Washington, 1894-1895." See Exhibit 3. See also testimony explaining it (Record p. 42). Exhibit 3 therefore is clearly the index sheet of the plat of the King County Tide Lands made by the King County Appraisers from which plat certain plates contained within the plat is certified in Exhibit 1 by the State Land Commissioner from the copy filed in the office of the State Land Commissioners.

We call attention to this notation made on Exhibit 3, "Nov. 17, 1894, the U. S. War Department approved and established the outer harbor lines, the waterway lines and the pierhead lines in the East and West Waterways, as indicated on within maps."

This endorsement is made entirely clear by reference to the laws of Washington as they existed at the time the plat was made. The outer harbor lines and the waterway lines were, under the Waterway Act, the Harbor Line Commission Act and Article XV of the Constitution referred to in the briefs, established by the Harbor Line Commission.

The outer harbor line being in deep water, it was of course subject to approval by the War Department of the United States under its jurisdiction over navigable waters, the outer harbor line for practical purposes becoming a pierhead line when established by the State authorities and approved by the War Department.

The lines of the waterway itself were laid out by the Harbor Line Commission and the pierhead line thereon was established by the United States Government. Certainly it must be so assumed in view of the fact that there was at that time no legislation of the State referring to the subject of pierhead lines or authorizing anybody to establish them, and the legislation of Congress did provide for their establishment by the War Department.

It is to be noted also that no plat in the record purports to be a plat of the waterway. Exhibit 1,

which is certified as being on record in the State Land Commissioner's office is not certified as to the waterway at all, but as to the lands adjacent to the waterway and even that plat, as we have demonstrated, is simply the plat made by the King County Tide Land Appraisers. Exhibit 3 is the index sheet of the Plat of the King County Tide Lands.

The law required the Harbor Line Commission to plat the waterway. That these plats of the Tide Lands are not the plat made by the Harbor Line Commission of the waterway, is apparent upon the face of the plats.

If the official plat of the Harbor Line Commission showed the pierhead line or if any claim is made in this case by the defendant as to the waterway based upon the manner of its platting by the Harbor Line Commission, why was not a copy of the plat produced in evidence?

Burden on Respondents as to Pierhead Line.

Appellant brought this action relying upon the right of the State in the waterway area as fixed by the legislation of the State of Washington, including Chapter 168 of the Laws of 1913.

Respondent Railroad Company in its answer at-

tacks the validity of Chapter 168 as being unconstitutional as interfering with its alleged vested property rights. It would seem elementary that respondent must prove any facts necessary to support its claim; if it bought relying upon a plat of the waterway made by the Harbor Line Commission showing pierhead lines, it must, to avail itself of that fact, make proof of the fact. The claim was made in the Answer and no proof given to support it. The claim not being founded in fact, and, even if it had been founded in fact, there being no authority in the laws of Washington for the establishment of such a pierhead line, it would seem clear that respondent must fail in its contention so far as it is based upon any State establishment of such a pierhead line prior to respondent's purchase.

The State Pierhead Line Even If It Existed Would Not Help Respondents.

But even if the Harbor Line Commission had marked in a pierhead line on the plat of the waterway, how does it help respondents? The waterways were not created at all for private purposes but only for purposes of public navigation and in the interest of the public and not private owners of tide lands. In the first place, if the Harbor Line Commission did

put the line on the map, it was wholly beyond their authority, certainly beyond their authority so far as thereby giving to the purchasers of property under the Tide Land Act, with whom they had nothing to do, rights in the waterway.

Not only so, but if we ignore the lack of any legislation authorizing the creation of a pierhead line in the waterway either by the Harbor Line Commission or by any State officer, any action by the State would be subject to the control of the Federal Government to locate pierhead lines in the interest of navigation. Whoever marked in the pierhead line originally, the final authority in placing it in the waterway was the War Department of the United States.

The waterway was created for the benefit of the whole people of the State in the interest of navigation. Wharves and other conveniences of commerce for the enjoyment of the rights of navigation are necessary as the means of communication between land and water. The State in the interest of the development of commerce and the actual use of the waterway, has provided by Chapter 168 of the Laws of 1913, for the erection of such wharves and conveniences of commerce. By way of grace the law offers the right to the upland owners to build these

wharves or structures for a moderate regulatory fee and provides that if they do not avail themselves of the opportunity the State will adopt other means to make the waterway useful by giving the right to erect structures in the waterway area to other persons. Respondents being offered this right declined to avail themselves of it. They now seek to insist that they have a right either to use or to keep the waterway area in front of their property without improvement, and that the State is helpless except as the abutting property owners see fit to improve the waterway area and construct wharves.

And these rights are based upon State deeds, which contain not the shadow of a suggestion of any rights in the waterway or any littoral or riparian rights whatsoever. Such a claim is so against the policy of the State that if these littoral or riparian rights are established in this waterway, it will be a new thing in the State of Washington and the first time that any such rights upon tide water have been recognized since Washington became a State. It would be going far to imply such rights as incident to a State grant, which it is admitted by respondents must be strictly construed.

Question of Estoppel.

Counsel contends that the respondent Railroad Company's predecessor in title bought by reference to the plats and that upon those plats the pierhead line appeared and that the State is estopped to question its existence. However, we think it well settled that an act of a State officer who acts clearly beyond any authority conferred by law cannot estop the State by his unauthorized act. Certainly there can be no estoppel rights here where the only plat shown in the record is one made of the King County Tide Lands by the King County Tide Land Appraisers who had nothing to do with the waterway. That estoppel will not lie in such a case, see the following authorities:

Lee Wilson & Co. vs. United States, 245 U. S. 24; 38 S. C. Rep. 21;

Mullen vs. State, 46 Pac. Rep. 670 (Calif.);

Childress County Land & Cattle Co. vs Baker, 50 S. W. Rep. 756;

Paul vs. Seattle, 40 Wash. 294.

State vs. Superior Court, 91 Wash. 454, 459.

Counsel for respondents in their brief at page 42 cites the above case to show that the boundaries within the waterway when the waterway was laid out

were thereby "segregated from the general mass of the State lands which it holds in its proprietary capacity and became vested in that special class which it holds for public use."

How then can respondents claim that those lands so held for a public use are subject to the easement of respondents to use them for private purposes? The State may, of course, change its laws and revoke its action in setting aside the lands within the waterway for public purposes, but until it has so revoked its action contained in the Waterway Act by subsequent action, how can the Land Department of the State sell to anyone tide lands by a grant which will carry with it as an incidental right, an easement for the private use of the grantee of a portion of this waterway? The case cited by counsel was one in which the Supreme Court held that no rights in the waterway could be condemned in an eminent domain proceeding.

The Rule as to Streets Not Controlling.

Counsel for respondents contend that the right of access by the abutting property owner to the waterway is analogous to the property owner's right of access to the streets adjoining his property. The

contrary rule would seem to necessarily result from the decision in the case of *Newell vs. Loeb*, 77 Wash. 182. Counsel, at page 70 of respondents' brief, attempts to distinguish this case upon the theory that it was based upon the paramount right of the State to improve navigation. It is not so treated by our Supreme Court. The decision was based on no such ground, but squarely upon the ground that the bed of the stream was owned by the State and that "the fact, if it is a fact, that the land of the appellants in this case borders upon the shore of the River, does not give them any rights either in the bed of the stream or in the waters thereof." We have quoted liberally from this case at pages 73 to 75 of our original brief. Certainly the numerous decisions we have cited from our Supreme Court in our original brief clearly demonstrate that under the laws of the State of Washington, a tide land proprietor has no rights in the public waters of the State upon which he fronts which are in any way to be compared with the rights of a lot owner abutting upon a public street.

Shively vs. Bowlby, 152 U. S. 1.

In referring to the above case on page 46 of re-

spondents' brief, counsel for respondents discusses the case as though it were a contest over littoral rights, and as though the question in the case at all involved the rights of the tide land purchaser from the State to littoral rights. We do not deem this a correct statement of the case. The upland proprietor claimed against Bowlby, the State's grantee, littoral rights to wharf out to the Columbia River across the tide lands which Bowlby bought from the State. There was no question involved of littoral rights claimed by Bowlby as incident to the tide lands which he acquired from the State. It is true that in the original complaint the plaintiff who was the State's grantee alleged his rights to wharf out to deep water in the Columbia River and sought to quiet his title against the donation land claimant who disputed his rights under the State deed. But the defendant interposed a counterclaim, basing his rights upon the government grant of the uplands and sought to quiet his title against the State's grantee, all the rights that the defendant claimed under the counterclaim being appurtenant to the upland and not to the tide land. A demurrer having been sustained to the counterclaim, the court on motion of plaintiff dismissed the action and the appeal was prosecuted

finally to this court upon the error in passing adversely upon the counterclaim and dismissing the case, the court saying,

> "The only matter adjudged was upon the counterclaim."

Nothing, therefore, in the case has to do with any littoral or riparian rights as pertaining to conveyances of tide or shore land made by a State.

Respondents' Construction of Tide Land Act.

On page 52 of respondents' brief, respondents quote from Section 12 of the Tide Land Act the provision giving to the successor in interest of an upland owner the preference rights of the upland owner to the extent of the grant. By an examination of the Tide Land Act, a considerable portion of which is printed in our brief, and the quotation above referred to from counsel's brief, it will clearly appear that the only purpose of the part of the Act quoted by counsel was to give to an upland owner's grantee the same rights an upland owner would have. Nothing is to be found in any of the Tide Land Acts which gives to the purchaser of any tide land any riparian or littoral right, the only right conferred being to purchase the tide land itself. We call attention also

to the language of that part of the Act quoted. The quotation is as follows:

> "When the abutting upland owner has attempted to convey by deed to a *bona fide* purchaser any portion of the tide lands in front of such uplands, or littoral rights therein, such right of purchase herein given to the upland owner shall be construed to belong to such purchaser, or to any person, association or corporation claiming by, through or under such purchaser, to the extent of the tract or rights so conveyed."

The words "littoral rights" in this provision of the Statute are followed by the word "therein," referring to the tide lands which are the subject of the grant and not to littoral rights in any other tide land or in any water. The right to use shore and tide lands where appurtenant to upland is treated as a littoral right in the books.

However, the words quoted from the Statute instead of being a recognition by the State of littoral rights in the tide lands, are shown upon their face to be a denial of such rights. The quoted language says when "the abutting land owner has *attempted* to convey * * * tide lands * * * or littoral rights therein." The whole statute was based upon the proposition that the upland owner did not own

the tide land or any littoral rights therein, but because upland owners had quite generally in territorial days assumed that they either had some rights therein or would be granted rights therein by the future State, and had conveyed and improved such tide-lands quite extensively, when the State was organized it granted to the upland owners certain preference rights, to improvers of tide-lands certain prefference rights, and, by the clause quoted by opposing counsel and which we have quoted above, it gave to those who had deeds from the upland owners like preference rights. But the rights were measured by the tide-land Act and only provided for the purchase of the tide-lands and not for any appurtenant littoral rights in any navigable water.

The Distinction Between Tide-Land and Shore Land.

On page 54 of respondents' brief, counsel says that the Statutes of the State define tide-lands as "extending to the harbor line, when established, while the outer boundary of shore lands is not stated." It being contended by respondent that there is no harbor line established here and it being so held by the trial court, and no contention being made as to that point upon this appeal, the definition is not applicable to

the situation here. The definition of tide-lands contained in the Statute is "all lands over which the tide ebbs and flows from the line of ordinary high tide to the line of extreme low tide," followed by the exception as to cases where harbor lines are established (Remington's 1915 Code, Section 6641). Both an inner and an outer boundary is therefore given to tide land.

The same section defines shore lands as "lands bordering on the shores of navigable lakes and rivers below the line of ordinary high water and not subject to tidal flow."

It thus appears that tide lands are bounded on both sides and the shore lands are only bounded on the upland side, and, as we have already pointed out in our original brief, the shore lands were sold by lineal front chain without the specification of an outer boundary, and that distinction is made the basis of the shore land cases cited by counsel and which we have already fully discussed in our original brief. The *dicta* referred to and quoted by respondents in these shore land cases have therefore no force in determining the question as to tide-land rights involved in this case.

Weems Steamboat Co. vs. Peoples Steamboat Co.,
214 U. S. 345.

On pages 68 and 69 counsel quotes from the above case as to riparian rights. The quotation itself shows that the question of riparian rights in the State of Washington must be decided by the decisions of the courts of Washington. The cases we have cited in our original brief show that the doctrine stated in the quotation is not applicable in Washington.

Not only so, but an examination of the Weems case itself shows that it was a case where one steamboat company owned the wharves and the land underneath and that the question in the case was as to the right of another steamboat company to enforce a joint user of these private wharves by paying compensation.

We respectfully pray as in our original brief,

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